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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 AMBER L. B.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.
16

CASE NO. 2:21-cv-01358-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17 This matter is before the Court on the parties' consent (Dkt. 2.) and on plaintiff's
18 complaint. Dkt. 5. The matter has been fully briefed. *See* Dkts. 13, 16, 17.

19 Plaintiff is a 43-year-old woman with prior employment as a cashier, sales attendant,
20 hotel clerk, receptionist, and nursery school attendant, who claims she can no longer work due to
21 physical and mental impairments, which include degenerative disc disease, migraines, depressive
22 disorder, posttraumatic stress disorder, and generalized anxiety disorder. The Administrative
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1 Law Judge (“ALJ”) found that plaintiff is not disabled because she has the residual functional
2 capacity (“RFC”) to perform light work.

3 In finding plaintiff not disabled, the ALJ rejected plaintiff’s subjective symptom
4 testimony and the medical opinion of psychological consultative examiner, Kisha Clune, MD.
5 The Court concludes that the ALJ erred in doing so. The ALJ’s rejection of plaintiff’s testimony
6 is not supported by clear and convincing reasons. Notably, the ALJ did not specify which
7 portions of plaintiff’s testimony were not credible and what evidence suggested the complaints
8 were not credible.

9 As for the medical opinion, although the ALJ provided multiple reasons for finding it not
10 persuasive, those reasons are not supported by substantial evidence or are unreasonable. For
11 example, substantial evidence does not support the ALJ’s conclusion that Dr. Clune’s opinion
12 was not based on objective evidence. The record reveals that Dr. Clune conducted a mental
13 status examination, which is objective evidence for mental health impairments. It is also
14 unreasonable for the ALJ to reject Dr. Clune’s medical opinion because it was based on one
15 examination and partially relied on plaintiff’s subjective reports.

16 The errors are not harmless because the ALJ’s evaluation of other evidence and the RFC
17 determination could well have differed had the improperly rejected evidence been credited.
18 Therefore, this matter is remanded for further proceedings.

19 **BACKGROUND**

20 Plaintiff, Amber L. B., was born in 1979 and was 40 years old on the alleged date of
21 disability onset of March 15, 2019. Administrative Record (“AR”) 100. Plaintiff has at least a
22 high school education and prior work experience as a cashier, sales attendant, hotel clerk,
23 receptionist, and nursery school attendant. AR 38, 39, 107.

1 Plaintiff's applications for disability insurance benefits pursuant to 42 U.S.C. § 423 (Title
2 II) and Supplemental Security Income benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of
3 the Social Security Act were denied initially and following reconsideration. AR 99, 108.
4 Plaintiff's requested hearing was held before ALJ Laura Valente on September 30, 2020. *Id.* at
5 46–78. On December 1, 2020, the ALJ issued a written decision in which she concluded that
6 plaintiff was not disabled pursuant to the Social Security Act. *Id.* at 12–40.

7 On August 27, 2021, the Appeals Council denied plaintiff's request for review, making
8 the written decision by the ALJ the final agency decision subject to judicial review. AR 1; *see* 20
9 C.F.R. § 404.981. Plaintiff filed a complaint in this Court seeking judicial review of the ALJ's
10 written decision in October 2021. Dkt. 5. Defendant filed the sealed administrative record
11 regarding this matter on December 6, 2021. Dkt. 11.

12 DISCUSSION

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
14 social security benefits if the ALJ's findings are based on legal error or not supported by
15 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
16 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

17 Plaintiff raises the following issues in her opening brief: (1) whether the ALJ erred in
18 rejecting plaintiff's subjective symptom testimony; (2) whether the ALJ erred in rejecting
19 medical opinions from treating and examining mental health experts; and (3) whether the ALJ's
20 residual functional capacity assessment is supported by substantial evidence. Dkt. 13. Because
21 the first and second issues presented by plaintiff are dispositive, the Court need not consider the
22 third, as the ALJ will need to reevaluate the entire matter on remand.

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I. Subjective Symptom Testimony

If an ALJ rejects the subjective symptom testimony of a claimant based on an underlying impairment that has been established, the ALJ must support the rejection by making “specific findings stating clear and convincing reasons for doing so.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)). That is not an easy task, because “[t]he clear and convincing standard is the most demanding required in Social Security cases.” *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002).

Here, plaintiff testified that she has trouble concentrating and experiences monthly panic attacks, anxiety, and a loss of motivation. AR 54, 66, 70, 72. She testified that she spends days in her apartment, does not bathe for days at a time, and has suicidal thoughts. AR 66.

The ALJ conceded that plaintiff’s medically determinable impairments could reasonably be expected to cause plaintiff’s symptoms. *See* AR 26. Nevertheless, the ALJ rejected plaintiff’s mental symptom testimony and provided three reasons for doing so. *Id.* However, the ALJ does not state which portion of plaintiff’s testimony is contradicted by a given reason. According to the Ninth Circuit,

[t]o ensure that our review of the ALJ’s credibility determination is meaningful, and that the claimant’s testimony is not rejected arbitrarily, we require the ALJ to specify which testimony she finds not credible, and then provide clear and convincing reasons, supported by evidence in the record, to support that credibility determination.

Brown-Hunter v. Colvin, 806 F.3d 487, 489 (9th Cir. 2015). Thus, the ALJ’s failure to explain which portion of plaintiff’s testimony is contradicted by her conclusions is legal error. *See Dodrill*, 12 F.3d at 918 (“It’s not sufficient for the ALJ to make only general findings; [s]he must state which [symptom] testimony is not credible and what evidence suggests the complaints are not credible.”).

1 To the extent that the ALJ is rejecting all of plaintiff's mental symptom testimony, the
2 Court concludes that the three reasons provided by the ALJ are not clear and convincing. First,
3 the ALJ stated that plaintiff's mental status examinations "generally reflect benign." AR 32.
4 However, the ALJ does not cite to any specific mental status examinations to support this
5 conclusion and merely references her prior summary of medical evidence. The Ninth Circuit has
6 held that that "an ALJ does not provide specific, clear, and convincing reasons for rejecting a
7 claimant's testimony by simply reciting the medical evidence in support of his or her residual
8 functional capacity determination." *Brown-Hunter*, 806 F.3d at 489. Further, there are mental
9 status examinations in the record that appear to contradict the ALJ's assertion. *See, e.g.*, AR
10 510–12 (mental status examination by Dr. Kisha Clune listing several impairments). Therefore,
11 this reason is not clear and convincing.

12 Second, the ALJ rejected plaintiff's testimony because "there is no indication that
13 [plaintiff's] treatment has changed or required referral to any more intensive mental health
14 intervention during the relevant time." AR 32. It appears that the ALJ penalized plaintiff because
15 she "has not required any inpatient hospitalizations, partial hospitalizations, structured living
16 arrangements, or emergency room visits as a result of any mental symptoms." AR 26. It is not
17 clear how plaintiff's testimony is not credible because of this reason. Defendant attempts to
18 clarify the ALJ's conclusion by arguing that "the record revealed that with therapy and
19 medication, [plaintiff] was coping better than she had in the past." Dkt. 16 at 4. However, "doing
20 well for the purposes of a treatment program has no necessary relation to a claimant's ability to
21 work or to her work-related functional capacity." *Hutsell v. Massanari*, 259 F.3d 707, 712 (9th
22 Cir. 2001). Moreover, the Ninth Circuit has emphasized that "it is error to reject a claimant's
23 testimony merely because symptoms wax and wane in the course of treatment." *Garrison v.*
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1 *Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014). Therefore, it was error for the ALJ to reject
2 plaintiff's testimony on this basis.

3 The ALJ also rejected plaintiff's subjective symptom testimony because she "is able to
4 perform a wide array of activities." AR 32. Specifically, the ALJ stated that plaintiff is "capable
5 of caring for her personal needs, caring for her minor son, caring for her dog, preparing complex
6 meals, performing household chores, shopping, . . . using public transportation, watching
7 television, reading, walking, and spending time with others." *Id.* However, plaintiff need not
8 "vegetate in a dark room" to be deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557,
9 561 (9th Cir. 1987). "[T]he mere fact that a plaintiff has carried on certain daily activities . . .
10 does not in any way detract from her credibility as to her overall disability." *Orn v. Astrue*, 495
11 F.3d 625, 639 (9th Cir. 2007) (quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)).
12 ALJ's should not use activities of daily living against a plaintiff unless they show that the
13 plaintiff "is able to spend a substantial part of [her] day engaged in pursuits involving the
14 performance of physical functions that are transferable to a work setting." *Id.* (citing *Fair v.*
15 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). The ALJ did not specify what portions of plaintiff's
16 testimony were contradicted by her activities of daily living and she did not assess whether these
17 activities met the threshold for transferable work skills. Therefore, this is not a clear and
18 convincing reason to reject plaintiff's subjective symptom testimony.

19 **II. The ALJ's Evaluation of Dr. Clune's Medical Opinion**

20 The Ninth Circuit has held that deference is due to a treating or examining doctor's
21 opinion and that if an ALJ rejects such an opinion and the opinion is contradicted by another
22 doctor's opinion, the "ALJ may only reject it by providing specific and legitimate reasons that
23 are supported by substantial evidence." *Garrison*, 759 F.3d at 1012. However, for applications
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1 filed on or after March 27, 2017, the Administration has directed ALJs that they are no longer to
2 defer to medical opinions from treating or examining sources (*see* 20 C.F.R. § 416.927(c)),
3 instead they must evaluate the persuasiveness of medical opinions by analyzing their
4 “supportability” and “consistency,” as well as other appropriate factors. 20 C.F.R. § 416.920c(a).

5 This Court—and others—have concluded that the new regulations supplant judicial
6 precedent regarding the weight given to controverted examining and treating source opinions, to
7 the extent that there is a conflict. *See* Dkt. 20, *Mooney v. Commissioner of Social Security*, 3:19-
8 cv-05103-RBL-JRC (W.D. Wash. Feb 14, 2020), *report and recommendation adopted*; Dkt. 15,
9 *Martinson v. Commissioner of Social Security*, 3:20-cv-05149-JRC (W.D. Wash. August 25,
10 2020); *see also Allen T. v. Saul*, No. EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal.
11 June 29, 2020) (“[T]he Court is mindful that it must defer to the new regulations, even where
12 they conflict with prior judicial precedent . . .”).

13 Nevertheless, the Court makes no ruling in this case about whether the specific and
14 legitimate standard of review continues to apply. Regardless of the outcome of this issue, the
15 Court must review whether the ALJ’s decision is supported by substantial evidence and is free
16 from legal error. *See Lambert v. Saul*, 980 F.3d 1266, 1277 (9th Cir. 2020). That is, the ALJ
17 “must provide sufficient reasoning that allows us to perform our own review, because the
18 grounds upon which an administrative order must be judged are those upon which the record
19 discloses that its action was based.” *Id.* (internal citations and quotations omitted).

20 On September 11, 2019, after performing a mental status examination, psychological
21 consultative examiner, Kisha Clune, MD, issued a report. *See* AR 502–12. She noted that
22 plaintiff’s ability to perform simple and repetitive tasks as well as her ability to perform work
23 activities on a consistent basis without special or additional instructions is “impaired.” *Id.* at 512.

1 She also opined that plaintiff's ability to perform work duties at a sufficient pace, maintain
2 regular attendance in the workplace, and complete a normal workday without interruptions is
3 "poor." *Id.*

4 The ALJ found Dr. Clune's mental evaluation unpersuasive for several reasons. First, the
5 ALJ stated that Dr. Clune's opinion was "devoid of signs and laboratory findings to support each
6 of the limitations opined." AR 34. Defendant notably does not attempt to defend this reason. *See*
7 Dkt. 16 at 8–10. Although Dr. Clune's opinion may not have been based on laboratory findings,
8 she conducted a mental status examination. *See* AR 510. The Court notes that "[l]ike the physical
9 examination, the Mental Status Examination is termed the *objective* portion of the patient
10 evaluation." Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination*
11 3 (Oxford University Press 1993); *see also Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir.
12 2017) (explaining that psychiatric evaluations may appear subjective, but such is the nature of
13 psychiatry). Therefore, it was unreasonable for the ALJ to reject Dr. Clune's opinion of
14 plaintiff's mental health because it was not based on laboratory findings.

15 Second, the ALJ stated that Dr. Clune's opinion is not well supported or consistent with
16 Dr. Clune's own mental status examination and the longitudinal record. AR 34. Indeed, the more
17 consistent a medical opinion is with the record as a whole, the more persuasive it will be. *See* 20
18 C.F.R. § 416.920c(c)(2). However, where an ALJ seeks to discredit a medical opinion, she must
19 explain why her own interpretations, rather than those of the doctors, are correct. *See Reddick v.*
20 *Chater*, 157 F.3d 715, 725 (9th Cir. 1998). The ALJ failed to do so here. Although the ALJ
21 stated that Dr. Clune's assessment is not consistent with her mental status examination and the
22 longitudinal record, the ALJ does not support her reasoning. *See* AR 34.

1 Defendant provides examples of “normal to benign objective findings” in the record to
2 support the ALJ’s conclusion. *See* Dkt. 16 at 9. But even if the ALJ was referring to those
3 citations, they still fail to show inconsistencies with Dr. Clune’s assessments. For example, it is
4 not clear how treatment notes that plaintiff was “pleasant” and “fairly upbeat” during
5 appointments, and that she had “normal memory, language, and fund of knowledge,” are
6 inconsistent with Dr. Clune’s assessed limitations to plaintiff’s ability to perform simple and
7 repetitive tasks, perform work activities on a consistent basis without special or additional
8 instructions, perform work duties at a sufficient pace, maintain regular attendance in the
9 workplace, or complete a normal workday without interruptions. AR 512. Further, as plaintiff
10 points out, the ALJ did not mention that Dr. Clune’s opinion is consistent with several medical
11 opinions in the record. *See* AR 707–13, 714–21, 722–29. Therefore, the ALJ’s conclusion that
12 Dr. Clune’s opinion is not consistent with her own findings and the longitudinal record is not
13 supported by substantial evidence.

14 Third, the ALJ rejected Dr. Clune’s opinion because she saw plaintiff “on a single
15 examination and largely relied on [plaintiff’s] subjective symptom reports in formulating her
16 opinions.” AR 34. The Court agrees with plaintiff that it was unreasonable for the ALJ to reject
17 Dr. Clune’s opinion because she only saw plaintiff one time. If this reason was enough, an ALJ
18 would be free to reject every consultative examining doctor’s opinion because they generally
19 only see claimants once. This Court agrees with other courts that have rejected similar reasons.
20 *See, e.g., Daniel H. v. Comm’r of Soc. Sec.*, C19-6147-BAT, 2020 WL 7054308 at *2 (W.D. Wash.
21 Dec. 2, 2020). Further, the ALJ erred in rejecting Dr. Clune’s opinion because it was partially based
22 on plaintiff’s subjective symptom reports. An ALJ may reject such an opinion once a claimant’s
23 subjective complaints have been properly discounted. *See Buck*, 869 F.3d at 1049. However, the
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1 Court concluded that the ALJ erred in rejecting plaintiff's subjective symptom testimony in this
2 matter. Therefore, the ALJ could not reject Dr. Clune's opinion on that basis.

3 Finally, the ALJ stated that Dr. Clune's opinions "are vague at best and do not
4 necessarily provide a function-by-function assessment of claimant's limitations arising from her
5 impairments." AR 34. Defendant argues that "[t]he ALJ reasonably discounted Dr. Clune's
6 opinion on this basis" because Dr. Clune's use of the term "impaired" in her opinion does not
7 specify whether such impairment is mild or severe. *See* Dkt. 16 at 8. However, defendant does
8 not provide any authority for that position. Nothing in 20 C.F.R. § 416.920c suggests that an ALJ
9 can reject a medical opinion on that basis. Further, Dr. Clune also used "poor" to describe other
10 limitations, which defendant does not argue is vague. Therefore, it was unreasonable to reject Dr.
11 Clune's entire opinion based on that reason.

12 **III. Other Issues**

13 Plaintiff also argues that the ALJ erred in rejecting other medical evidence and the
14 ultimate RFC determination. Because this Court is remanding this matter for further proceedings,
15 the ALJ must reassess all of the evidence and make another RFC determination. *See* Program
16 Operations Manual System (POMS) GN 03106.036 *Court Remand Orders*,
17 <https://secure.ssa.gov/poms.nsf/lnx/0203106036> (last visited April 14, 2022) (a court order
18 vacating a prior decision and remanding the case voids the prior decision and thus returns the
19 case to the status of a pending claim). Thus, this Court does not address plaintiff's remaining
20 issues.

21 **IV. Remedy**

22 "The decision whether to remand a case for additional evidence, or simply to award
23 benefits[,] is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.
24 1987). If an ALJ makes an error and the record is uncertain and ambiguous, the court should

1 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir.
2 2017). Likewise, if the court concludes that additional proceedings can remedy the ALJ's errors,
3 it should remand the case for further consideration. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th
4 Cir. 2017).

5 The Ninth Circuit has developed a three-step analysis for determining when to remand
6 for a direct award of benefits. Such remand is generally proper only where:

7 (1) the record has been fully developed and further administrative proceedings
8 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient
9 reasons for rejecting evidence, whether claimant testimony or medical opinion; and
10 (3) if the improperly discredited evidence were credited as true, the ALJ would be
11 required to find the claimant disabled on remand.

12 *Trevizo v. Berryhill*, 871 F.3d 664, 682–83 (9th Cir. 2017) (quoting *Garrison*, 759 F.3d at 1020.

13 However, when an ALJ errs, the proper course is to remand for further administrative
14 proceedings “except in rare circumstances.” *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d
15 1090, 1099 (9th Cir. 2014).

16 Here, the analysis ends at the first step. There remain open questions regarding the extent
17 of inconsistencies between the medical evidence in the record. The ALJ will need to consider
18 what impact the improperly rejected testimony and opinion evidence will have on the evaluation
19 of other medical opinion evidence and the ultimate RFC determination. This type of fact-finding
20 is a function of the ALJ. Therefore, a remand for further proceedings is appropriate.

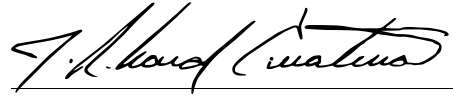
21 CONCLUSION

22 Based on these reasons and the relevant record, the Court orders that this matter be
23 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for
24 further consideration consistent with this order.

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Judgment should be for plaintiff and the case should be closed.

Dated this 15th day of April, 2022.

A handwritten signature in black ink, reading "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura
Chief United States Magistrate Judge